

ORIGINAL  
FILED  
07 MAY 25 PM 12:20  
RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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9 Attorneys for Defendant  
Pan-American Life Insurance Company

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA

12 DONNA MATHEWS,

13 Plaintiff,

14 vs.

15 PAN-AMERICAN LIFE INSURANCE  
COMPANY, and DOE 1 through DOE 20,  
16 Inclusive,

17 Defendants.

E-filing

EMC

Case No.

NOTICE OF REMOVAL

18  
19 TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
20 DISTRICT OF CALIFORNIA:

21  
22 PLEASE TAKE NOTICE THAT defendant Pan-American Life Insurance Company ("Pan-  
23 American") hereby removes the above-entitled civil action from the Superior Court of California,  
24 County of Napa, to the United States District Court for the Northern District of California, pursuant  
25 to 28 U.S.C. Section 1332, *et seq.* and 28 U.S.C. Section 1441, *et seq.*, and alleges that removal is  
26 proper for the following reasons:

27  
28 1. On April 19, 2007, plaintiff Donna Mathews ("plaintiff") filed the above-entitled

REED SMITH LLP  
A limited liability partnership formed in the State of Delaware

1 action in the Superior Court of the State of California, County of Napa. Napa County is within this  
2 judicial district. Pan-American first received notice of this action by service of the summons and  
3 complaint on April 27, 2007. Thirty days since notice and service has not yet expired. The  
4 complaint was the first pleading, notice, order or other paper from which it could be ascertained that  
5 the case is removable.

6 2. Based upon the allegations of plaintiff's complaint, plaintiff is a citizen of the State of  
7 California, County of Napa.

8 3. Defendant Pan-American Life Insurance Company is, and at all relevant times was, a  
9 corporation duly organized and existing under the laws of the State of Louisiana, with its principal  
10 place of business in New Orleans, Louisiana.

11 4. Defendants Does 1 through 20, inclusive, are defendants sued under fictitious names  
12 who have not as yet been served. For purposes of this Notice of Removal, the citizenship of such  
13 fictitious defendants is to be disregarded pursuant to 28 U.S.C. Section 1441(a).

14 5. While Pan-American denies that plaintiff is entitled to any recovery whatsoever, the  
15 amount in controversy for purposes of removal is measured by plaintiff's claims at the time of  
16 removal, not by the ultimate merit (or lack of merit) of plaintiffs' action. *See Eagle v. Am. Tel. &*  
17 *Tel. Co.*, 769 F.2d 541, 545 (9th Cir. 1985). In measuring the amount in controversy, a court must  
18 assume that the allegations of the complaint are true and assume that a jury will return a verdict for  
19 the plaintiff on all claims made in the complaint. *See Kenneth Rothschild Trust v. Morgan Stanley*  
20 *Dean Witter*, 199 F. Supp. 2d 993, 1001 (C.D. Cal. 2002). Moreover, "the amount in controversy is  
21 not measured by the low end of an open-ended claim, but rather by reasonable reading of the value  
22 of the rights being litigated." *See id.* (quoting *Angus v. Shiley*, 989 F.2d 142, 146 (3d Cir. 1993)).

23 6. The amount in controversy in this case is in excess of \$75,000.00, exclusive of  
24 interests and costs, because the Complaint seeks unspecified amounts in damages for breach of  
25 contract, breach of the covenant of good faith and fair dealing, fraud, negligent misrepresentation,  
26 intentional infliction of emotional distress and unfair business practices, including "loss of the  
27 benefits provided by the Policies plus such reasonably foreseeable consequential damages"  
28 (Complaint at ¶¶ 23, 27, 33, 37), mental and emotional distress (*id.* at ¶¶ 27, 33, 37, 43, 47), punitive

damages (*id.* at ¶¶ 28, 34, 44 and page 10, line 20), and attorneys' fees (*id.* at ¶¶ 27, page 10, line 21 and page 11, line 6). These claims are based on plaintiff's allegations that Pan-American wrongfully withheld benefit payments due under several long term disability insurance policies, refused to provide rehabilitation benefits and refused to fully refund premiums paid during plaintiff's alleged disability. (*Id.* at ¶¶ 11, 15, 17, 21, 25).

7. Where it is not evident from the clear allegations of the complaint that more than \$75,000 is in controversy, the court may consider "facts presented in the removal petition as well as any summary-judgment-type evidence relevant to the amount in controversy at the time of removal." *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003).

8. The jurisdictional minimum may also be satisfied by claims for extracontractual damages, special and general damages, attorneys' fees and punitive damages. *See Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001); *Simmons v. PCR Technology*, 209 F. Supp. 2d 1029, 1031 (N.D. Cal. 2002).

9. Plaintiff requests punitive damages. The amount in controversy may include punitive damages when they are recoverable as a matter of law. *Gibson*, 261 F.3d at 945. Plaintiff has asserted a cause of action for breach of the covenant of good faith and fair dealing, for which punitive damages may be recovered. Plaintiff has also asserted causes of action for fraud and intentional infliction of emotional distress, which permit recovery of punitive damages. Civil Code § 3294.

10. The Complaint also seeks an unspecified amount of attorneys' fees. Attorneys' fees may be included in the amount in controversy if recoverable by statute or contract. *Simmons*, 209 F. Supp. 2d at 1034-1035 (citing *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155-1156 (9th Cir. 1998)). California law permits the recovery of certain attorneys' fees as an element of damages in actions against an insurer for breach of the implied covenant of good faith and fair dealing. *See Brandt v. Superior Court*, 37 Cal. 3d 813 (1985).

11. The civil action is therefore removed to this District Court on the basis of diversity jurisdiction under the provisions of 28 U.S.C. Sections 1332, 1441 and 1446.


12. Attached hereto as Exhibit A is a true and correct copy of all pleadings and process

1 filed in this civil action in the Superior Court and served on defendants.

2 A Notice of Filing Removal is concurrently being filed with the Superior Court for the State  
3 of California, County of Napa, and being served on plaintiff.

4  
5 DATED: May 24, 2007.

6 REED SMITH LLP

7  
8 By   
9 Thomas A. Evans  
10 Eugenia S. Chern  
11 Attorneys for Defendant  
12 Pan-American Life Insurance Company  
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A limited liability partnership formed in the State of Delaware

## **EXHIBIT A**

**SUMMONS**  
(CITACION JUDICIAL)

SUM-100

**NOTICE TO DEFENDANT:****(AVISO AL DEMANDADO):**

PAN AMERICAN LIFE INSURANCE COMPANY; and DOE 1  
through Doe 20, Inclusive

**DELAY REDUCTION CASE**

**YOU ARE BEING SUED BY PLAINTIFF:****(LO ESTÁ DEMANDANDO EL DEMANDANTE):**

DONNA MATHEWS

FOR COURT USE ONLY  
(SOLO PARA USO DE LA CORTE)

**ENDORSED**

APR 19 2007

Clerk of the Napa Superior Court  
By: N. BENAVIDEZ  
Deputy

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), or by contacting your local court or county bar association.

*Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California ([www.courtinfo.ca.gov/selfhelp/espanol/](http://www.courtinfo.ca.gov/selfhelp/espanol/)), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.*

*Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), en el Centro de Ayuda de las Cortes de California, ([www.courtinfo.ca.gov/selfhelp/espanol/](http://www.courtinfo.ca.gov/selfhelp/espanol/)) o poniéndose en contacto con la corte o el colegio de abogados locales.*

The name and address of the court is:

(El nombre y dirección de la corte es):

NAPA COUNTY SUPERIOR COURT

825 Brown St.

Napa, CA 94559

CASE NUMBER:  
(Número del Caso):

26-51498

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

MICHAEL E. KINNEY SB#77018

707-527-4141

LAW OFFICES OF MICHAEL E. KINNEY

438 First St.

Santa Rosa, CA 95401

DATE: APR 19 2007

(Fecha)

Clerk, by

N. BENAVIDEZ

(Secretario)

Deputy

(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

**NOTICE TO THE PERSON SERVED: You are served**

1. ☐ as an individual defendant.  
2. ☐ as the person sued under the fictitious name of (specify):

3. ☐ on behalf of (specify):

- under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)  
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)  
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)  
☐ other (specify):

4. ☐ by personal delivery on (date):

(SEAL)

SEAL

**FILED**

APR 19 2007

Clerk of the Napa Superior Court  
By: M. Bonawit  
Deputy

1 MICHAEL E. KINNEY  
2 Bar No. 77018  
3 Law Office of Michael E. Kinney  
4 438 First St.  
5 Fourth Floor  
6 Santa Rosa, CA 95401  
7 (707) 527-4141

8 Attorney for Plaintiff  
9 DONNA MATHEWS DELAY REDUCTION CASE

CASE MANAGEMENT CONFERENCE  
DATE: 9-20-07  
TIME: 8:30am A  
PLACE: Courtroom  
825 Brown Street, Napa CA 94559

10  
11  
12 SUPERIOR COURT OF CALIFORNIA  
13 COUNTY OF NAPA

14 DONNA MATHEWS,

15 Plaintiff,

16 vs.

17 PAN AMERICAN LIFE INSURANCE  
18 COMPANY; and DOE 1 through Doe 20,  
19 Inclusive,

20 Defendants.

No. **26-37498**

COMPLAINT FOR BREACH OF  
CONTRACT, BREACH OF THE  
COVENANT OF GOOD FAITH  
AND FAIR DEALING, FRAUD,  
NEGLIGENT  
MISREPRESENTATION,  
INTENTIONAL INFLECTION OF  
EMOTIONAL DISTRESS, UNFAIR  
BUSINESS PRACTICES

UNLIMITED CIVIL CASE

21 COME NOW Plaintiff DONNA MATHEWS and complains and alleges as follows:

22  
23 GENERAL ALLEGATIONS

24 1. Plaintiff DONNA MATHEWS is and at all times relevant hereto was a  
25 resident of the County of Napa, State of California.

26 2. Plaintiff is informed and believes and thereon alleges that Defendant PAN  
27 AMERICAN LIFE INSURANCE COMPANY is, and at all times relevant hereto was, a  
corporation duly authorized to do business, and doing business as an insurance company in the  
State of California.

3. The true names and capacities, whether individual, corporate, associate or  
otherwise of Defendants Doe 1 through Doe 20, inclusive, are unknown to Plaintiff, who therefore

APR 18 2007



1       sues said Defendants by such fictitious names. Plaintiff will amend this Complaint to show their  
2       true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges  
3       that said Defendants, and each of them, were in some way responsible for the harm caused to  
4       Plaintiff as alleged in this Complaint.

5               4.       Plaintiff is informed and believes and thereon alleges that each of the  
6       Defendants herein was at all times relevant hereto the agent, employee or representative of the  
7       remaining Defendants and was acting at least in part within the course and scope of such  
8       relationship.

9               5.       In or about May 1991, at Napa County, California, Plaintiff purchased a  
10      long term disability insurance policy from Defendants, designated by Defendants as Policy No.  
11      0012857640. Between May 1991 and November 2005, Plaintiff purchased two additional long  
12      term disability insurance policies from Defendants, designated by Defendants as Policy No.  
13      0012577580 and Policy No. 1257573. The three long term disability policies are hereinafter  
14      collectively designated as "the Policies." This Policies, by their terms, purported to provide long  
15      term disability insurance benefits, including monthly benefit payments and additional funds for the  
16      vocational rehabilitation of the policy holder.

17              6.       Plaintiff authorized Defendants to make withdrawals from Plaintiff's bank  
18      account monthly in the amount of the monthly premiums for the Policies. Defendants made such  
19      monthly withdrawals. All premiums on the Policies were paid up to the date of Plaintiff's  
20      disability, and the Policies have remained in effect at all times relevant hereto.

21              7.       In November 2005, Plaintiff fell off a ladder and was injured. Plaintiff  
22      suffered a shoulder injury which rendered her disabled from her regular job as a dental hygienist.  
23      Defendants have determined that the date of the inception of Plaintiff's disability is December 14,  
24      2005. Plaintiff has been continuously disabled since December 2005, and remains disabled at this  
25      time.

26              8.       Plaintiff provided Defendants with prompt notice of her injury and  
27      disability.

28              9.       The Policies provide for a waiver of premium payments during the



1 policyholder's disability, but that premiums must be paid during the first ninety days of disability.  
2 The Policies further provide that Defendants "will refund any premiums paid during the first ninety  
3 days of disability, if premiums are waived." Following Plaintiff's disability, Defendants continued  
4 to withdraw premiums from Plaintiff's account, but refused, and continue to refuse, to refund the  
5 full amount of premiums paid during the first ninety days of Plaintiff's disability, although Plaintiff  
6 requested a full refund.

7 10. On or about March 15, 2006, without first contacting Plaintiff or  
8 Plaintiff's employer or otherwise performing a reasonable investigation as to whether Plaintiff was  
9 still disabled or had returned to work, Defendants unilaterally stopped paying benefits to Plaintiff.  
10 Plaintiff had not returned to work and was still disabled, as Defendants knew or reasonably should  
11 have known.

12 11. On or about April 17, 2006, without prior notice to Plaintiff, Defendants  
13 improperly withdrew the sum of \$1,189.61 from Plaintiff's bank account. Plaintiff is informed  
14 and believes that Defendants claim that this sum represents an annual premium for two of the  
15 policies and a monthly premium for the third policy. At no time has Plaintiff ever authorized  
16 Defendants to withdraw more than a monthly premium, and Defendants have never been  
17 authorized to withdraw an annual premium from Plaintiff's account. On or about April 17, 2006,  
18 Plaintiff was disabled and had been disabled for more than ninety days. Under the terms of the  
19 Policies, premiums were waived and Defendants were not entitled to any premium payment  
20 whatsoever at that time.

21 12. In March 2006, Defendants paid Plaintiff benefits on Policy No.  
22 0012857640 and on Policy No. 0012577580, but did not pay benefits due under the third policy,  
23 although such benefits were clearly due and owing to Plaintiff. Defendants concealed from  
24 Plaintiff the fact that they were not paying all of the benefits to which Plaintiff was due and  
25 provided Plaintiff no notice whatsoever that Defendants had underpaid Plaintiff.

26 13. Following Plaintiff's disability in December 2005, Defendants withdrew  
27 funds from Plaintiff's bank account as a premium payment on Policy No. 1257573. These  
28 withdrawals continued without interruption through August 2006, although Defendants were

1 obligated to waive the premium during the period of Plaintiff's disability.

2 14. Defendants improperly suspended all payments of Plaintiff's benefits on  
3 all of the Policies and made no payments whatsoever to Plaintiff from March 6, 2006 until July 13,  
4 2006, even though Defendants knew or reasonably should have known that Plaintiff was disabled  
5 during this entire period. On July 13, 2006, Defendants resumed paying benefits on Policy No.  
6 0012857640 and on Policy No. 0012577580. Although Defendants then owed Plaintiff for four  
7 months of benefits on those two policies, they paid only a portion of the benefits then past due.  
8 Since July 2006, Defendants have never brought current the benefits payments due to Plaintiff, and  
9 remain months in arrears on the payments due to Plaintiff.

10 15. Defendants failed to pay any benefits on Policy No. 1257573 until  
11 September 2006, by which time Defendants owed benefits for seven months. In September 2006,  
12 Defendants paid a portion of the benefits then past due. Since September 2006, Defendants have  
13 never brought current the benefits payments due to Plaintiff, and remain months in arrears on the  
14 payments due to Plaintiff,

15 16. In addition to monthly benefit payments, the Policies provide the benefit  
16 of rehabilitation. The Policies provide:

17 "We will pay for a rehabilitation program that we approve. Maximum  
18 payment for a single disability will be 24 times the Monthly Benefit. With our  
19 permission this maximum may be waived. This payment will have no effect on any  
20 other benefit of this policy.'

21 17. Plaintiff duly applied to Defendants for the rehabilitation benefit offered  
22 by the policy. Defendants denied Plaintiff's request for rehabilitation benefits without basis or  
23 explanation. Plaintiff's request for the rehabilitation benefit was reasonable and proper and  
24 Defendants' denial was completely unjustified.

25 18. Defendants have engaged in tactics designed to confuse Plaintiff and to  
26 cover up Defendants' inadequate payment of benefits and excessive withdrawal of premiums from  
27 Plaintiff's bank account. These tactics include sending Plaintiff undated Explanations of Benefits,  
28 sending premium notices at times when Defendants were obligated to waive premiums, sending

1 premium refund checks without explanation of what premiums were being refunded, sending  
2 benefit payments in the wrong amount, and refusing to account for all premiums withdrawn from  
3 Plaintiff's account.

4 19. When Plaintiff complained about the conduct of Defendants, Defendants  
5 responded by compelling Plaintiff to attend a medical examination more than 100 miles from  
6 Plaintiff's home. Plaintiff is informed and believes that Defendants took this action to retaliate  
7 against Plaintiff for complaining about the conduct of Defendants.

8 FIRST CAUSE OF ACTION  
9 AGAINST DEFENDANTS AND EACH OF THEM  
10 FOR BREACH OF CONTRACT

11 20. Plaintiff hereby repeats and repleads Paragraph 1 through Paragraph 19 of  
12 the General Allegations.

13 21. Defendants, and each of them, have failed and refused to perform their  
14 contractual obligation under the Policies to pay Plaintiff's benefits in full, to refund all premiums  
15 taken during Plaintiff's disability, and to provide Plaintiff with rehabilitation benefits, although  
16 demand therefor has been made.

17 22. Plaintiff paid all premiums and performed all acts required of her under  
18 the Policies.

19 23. As the result of Defendants' breach of contract, as aforesaid, Plaintiff has  
20 suffered a loss of the benefits provided by the Policies plus such reasonably foreseeable  
21 consequential damages as she has and will incur in the future.

22 SECOND CAUSE OF ACTION  
23 AGAINST DEFENDANTS AND EACH OF THEM  
24 FOR BREACH OF THE COVENANT OF GOOD FAITH  
25 AND FAIR DEALING

26 24. Plaintiff hereby repeats and repleads Paragraph 1 through Paragraph 19 of  
27 the General Allegations and Paragraph 21 through Paragraph 23, inclusive of the First Cause of  
28 Action.

1                   25.       The decision of Defendants, and each of them, to withhold benefits  
2 payments due under the Policy, to refuse to provide rehabilitation benefits, to refuse to fully refund  
3 premiums paid during Plaintiff's disability, to engage in tactics to confuse Plaintiff and obfuscate  
4 Defendants wrongdoing, and to retaliate against Plaintiff was unreasonable because:

- 5                   a. Defendants failed to investigate Plaintiff's claim thoroughly;  
6                   b. Defendants failed to evaluate Plaintiff's claim objectively;  
7                   c. Defendants utilized an unduly restrictive, overly technical and clearly  
8 erroneous interpretation of the Policy which ignored established law;  
9                   d. Defendants failed to adequately communicate with Plaintiff, and failed  
10 to state an adequate basis for the refusal to pay Plaintiff's claim;  
11                   e. Defendants misrepresented pertinent facts or insurance policy  
12 provisions relating to refund of premiums, policies in force, benefits due  
13 and Plaintiff's right to rehabilitation benefits;  
14                   f. Defendants failed to adopt and implement reasonable standards for the  
15 prompt investigation and processing of claims arising from policies like  
16 Plaintiff's;  
17                   g. Defendants failed to make prompt and timely payment of benefits  
18 which it acknowledged were due; and  
19                   h. Defendants engaged in abusive practices to avoid paying claims.

20                   26.       The acts of Defendants, as aforesaid, constitute a breach of the covenant  
21 of good faith and fair dealing.

22                   27.       As a proximate result of Defendants' bad faith, Plaintiff has suffered and  
23 continues to suffer losses of the benefits provided by the Policy and has suffered and continues to  
24 suffer injury, embarrassment, humiliation and mental anguish all to her damage in an amount  
25 according to proof. Plaintiff has been required to retain an attorney and incur attorney fees to  
26 enforce the Policies.

27                   28.       Defendants committed the acts alleged herein maliciously, fraudulently  
28 and oppressively, with the wrongful intention of injuring Plaintiff, from an improper and evil

1 motive amounting to malice, and in conscious disregard of Plaintiff's rights. Plaintiff is thus  
2 entitled to recover punitive damages from Defendants, and each of them, in an amount according  
3 to proof.

4  
5 **THIRD CAUSE OF ACTION**  
6 **AGAINST DEFENDANTS AND EACH OF THEM**  
7 **FOR FRAUD**

8 29. Plaintiff hereby repeats and repleads Paragraph 1 through Paragraph 19 of  
9 the General Allegations, Paragraph 21 through Paragraph 23, inclusive of the First Cause of  
10 Action, and Paragraph 25 through Paragraph 28, inclusive of the Second Cause of Action.

11 30. In obtaining the Policies and in keeping the Policies in force, Plaintiff  
12 reasonably relied upon the representations contained in Defendants' advertising and in the Policies  
13 that Plaintiff would be paid benefits timely and in full as provided by the Policies, that premiums  
14 would be waived during the period of Plaintiff's disability, that premiums paid at the beginning of  
15 Plaintiff's disability would be refunded, that Plaintiff would be permitted the rehabilitation benefit  
16 stated in the policy.

17 31. The representations described in the preceding Paragraph were false. The  
18 true fact was that Defendants would not do any of the things described in the preceding Paragraph,  
19 but instead would refuse to do those things and would attempt to obfuscate and cover up yheir  
20 refusal and would retaliate against Plaintiff if she complained.

21 32. Defendants knew, or in the exercise of reasonable care should have  
22 known, that the representations described above were false, but nonetheless failed to tell Plaintiff  
23 the true facts. Said representations were made with the intent to deceive Plaintiff and to induce  
24 Plaintiff to pay premiums on the Policies.

25 33. As a proximate result of Defendants' fraud, Plaintiff has suffered and  
26 continues to suffer losses of the benefits provided by the Policy and has suffered and continues to  
27 suffer injury, embarrassment, humiliation and mental anguish all to her damage in an amount  
28 according to proof.

34. Defendants committed the acts alleged herein maliciously, fraudulently

1 and oppressively, with the wrongful intention of injuring Plaintiff, from an improper and evil  
 2 motive amounting to malice, and in conscious disregard of Plaintiff's rights. Plaintiff is thus  
 3 entitled to recover punitive damages from Defendants, and each of them, in an amount according  
 4 to proof.

5 **FOURTH CAUSE OF ACTION**  
 6 **AGAINST DEFENDANTS AND EACH OF THEM**  
 7 **FOR NEGLIGENT MISREPRESENTATION**

8 35. Plaintiff hereby repeats and repleads Paragraph 1 through Paragraph 19 of  
 9 the General Allegations, Paragraph 21 through Paragraph 23, inclusive of the First Cause of  
 10 Action, Paragraph 25 through Paragraph 28, inclusive of the Second Cause of Action, and  
 11 Paragraph 30 through Paragraph 34 of the Third Cause of Action.

12 36. Plaintiff is informed and believes and thereon alleges that during the time  
 13 Defendants misled Plaintiff, as aforesaid, Defendants lacked any reasonable ground for believing  
 14 the representations described above to be true. Plaintiff justifiably relied on said statements.

15 37. As a proximate result of Defendants' negligent misrepresentations,  
 16 Plaintiff has suffered and continue to suffer losses of the benefits provided by the Policy and has  
 17 suffered and continues to suffer injury, embarrassment, humiliation and mental anguish all to her  
 18 damage in an amount according to proof.

19 **FIFTH CAUSE OF ACTION**  
 20 **AGAINST DEFENDANTS AND EACH OF THEM**  
 21 **FOR UNFAIR BUSINESS PRACTICES**

22 38. Plaintiff hereby repeats and repleads Paragraph 1 through Paragraph 19 of  
 23 the General Allegations, Paragraph 21 through Paragraph 23, inclusive of the First Cause of  
 24 Action, and Paragraph 25 through Paragraph 28, inclusive of the Second Cause of Action,  
 25 Paragraph 30 through Paragraph 34 of the Third Cause of Action, and Paragraph 36 through 37,  
 26 inclusive of the Fourth Cause of Action.

27 39. The practices of Defendants described hereinabove are unlawful, unfair or  
 28 fraudulent business practices of the sort prohibited by California Business and Professions Code



1 section 17200.

2 40. Defendants have improperly profited from the practices described above.

3 SIXTH CAUSE OF ACTION  
4 AGAINST DEFENDANTS AND EACH OF THEM  
5 FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

6 41. Plaintiff hereby repeats and repleads Paragraph 1 through Paragraph 19 of  
7 the General Allegations, Paragraph 21 through Paragraph 23, inclusive of the First Cause of  
8 Action, Paragraph 25 through Paragraph 28, inclusive of the Second Cause of Action, Paragraph  
9 30 through Paragraph 34 of the Third Cause of Action, Paragraph 36 through 37, inclusive of the  
10 Fourth Cause of Action, and Paragraph 39 through Paragraph 40 inclusive of the Fifth Cause of  
11 Action.

12 42. The conduct set forth hereinabove was extreme and outrageous and an  
13 abuse of the authority and position of Defendants and each of them. Said conduct was intended to  
14 cause severe emotional distress, or was done in conscious disregard of the probability of causing  
15 such distress.

16 43. As a proximate result of Defendants' intentional conduct, as aforesaid,  
17 Plaintiff suffered emotional distress and mental suffering, embarrassment, humiliation and mental  
18 anguish all to his damage in an amount according to proof.

19 44. Defendants committed the acts alleged herein maliciously, fraudulently  
20 and oppressively, with the wrongful intention of injuring Plaintiff, from an improper and evil  
21 motive amounting to malice, and in conscious disregard of Plaintiff's rights. Plaintiff thus is  
22 entitled to recover punitive damages from defendant in an amount according to proof.

23 SEVENTH CAUSE OF ACTION  
24 AGAINST DEFENDANTS AND EACH OF THEM  
25 FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

26 45. Plaintiff hereby repeats and repleads Paragraph 1 through Paragraph 19 of  
27 the General Allegations, Paragraph 21 through Paragraph 23, inclusive of the First Cause of  
28 Action, Paragraph 25 through Paragraph 28, inclusive of the Second Cause of Action, Paragraph



30 through Paragraph 34 of the Third Cause of Action, Paragraph 36 through 37, inclusive of the Fourth Cause of Action, and Paragraph 39 through Paragraph 40 inclusive of the Fifth Cause of Action.

46. The conduct set forth hereinabove was extreme and outrageous and an abuse of the authority and position of Defendants and each of them. Defendants knew, or should have known, that their acts would cause plaintiff emotional distress.

47. As a proximate result of Defendants' negligence, as aforesaid, Plaintiff suffered emotional distress and mental suffering, embarrassment, humiliation and mental anguish all to his damage in an amount according to proof.

WHEREFORE, Plaintiff prays judgment against Defendants, and each of them, as follows:

#### ON THE FIRST CAUSE OF ACTION

1. For damages according to proof;
2. For prejudgment interest on that sum;
3. For costs of suit herein incurred; and
4. For such other and further relief as the Court deems proper.

#### ON THE SECOND, THIRD AND SIXTH CAUSES OF ACTION

1. For special damages according to proof;
2. For general damages according to proof;
3. For punitive damages in a sum sufficient to punish Defendants;
4. For Plaintiff's attorney fees incurred to enforce the Policies;
5. For costs of suit herein incurred; and
6. For such other and further relief as the Court deems proper.

#### ON THE FOURTH AND SEVENTH CAUSES OF ACTION

1. For special damages according to proof;
2. For general damages according to proof;
3. For costs of suit herein incurred; and
4. For such other and further relief as the Court deems proper.

ON THE FIFTH CAUSE OF ACTION

1. For an order that Defendants and their agents, attorneys, servants and employees be restrained and enjoined from the unfair business practices as alleged;
2. For an order that Defendants and their agents, attorneys, servants and employees disgorge any and all profits they have made attributable to said unfair business practices;
3. For an award of attorney fees pursuant to Code of Civil Procedure section 1021.5;
4. For costs of suit herein incurred;
5. For such other and further relief as the Court deems proper.

Dated: April 16, 2007

LAW OFFICE OF MICHAEL E. KINNEY

By: Michael E. Kinney  
Michael E. Kinney  
Attorney for Plaintiff

### PROOF OF SERVICE


I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. I am employed in the office of a member of the bar of this court at whose direction the service was made. My business address is REED SMITH LLP, 1999 Harrison Street, Suite 2400, Oakland, CA 94612-3572. On May 24, 2007, I served the following document(s) by the method indicated below:

### NOTICE OF REMOVAL

- ☐ by transmitting via facsimile on this date from fax number 510.273.8832 the document(s) listed above to the fax number(s) set forth below. The transmission was completed before 5:00 PM and was reported complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting fax machine. Service by fax was made by agreement of the parties, confirmed in writing.
- ☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.
- ☐ by placing the document(s) listed above in a sealed envelope(s) and by causing personal delivery of the envelope(s) to the person(s) at the address(es) set forth below. A signed proof of service by the process server or delivery service will be filed shortly.
- ☐ by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below. A copy of the consignment slip is attached to this proof of service.
- ☐ by transmitting via email to the parties at the email addresses listed below:

Michael E. Kinney, Esq.  
Law Office of Michael E. Kinney  
438 First Street  
Fourth Floor  
Santa Rosa, CA 95401

I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed May 24, 2007, at Oakland, California.

  
\_\_\_\_\_  
Norene Avakian